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**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEVADA**

In re:	Case No.: BK-S-08-10936-MKN
SILVER STATE HELICOPTERS, LLC,	Chapter 7
Debtor.	(Jointly Administered)

In re:	Case No.: BK-S-08-10935-MKN
SILVER STATE SERVICES CORP.,	Chapter 7
Debtor.	Date: N/A
	Time: N/A

**WESTERN AIRCRAFT, INC.'S NOTICE OF APPEAL**

Western Aircraft, Inc. ("Western"), by and through its undersigned counsel, respectfully submits this Notice of Appeal. This is an appeal of: (1) Memorandum Decision on Motion of

1 Western Aircraft, Inc. for Order Requiring Payment of Administrative Expense Claim, Made  
2 Pursuant to 11 U.S.C. §365(d)(3), 503(b) and 507(a)(1), And for Allowance of Administrative  
3 Claim Under 11 U.S.C. §503(b), And Trustee's Emergency Motion to Strike Extant Document  
4 [Dkt. No. 535] On Order Shortening Time (the "Memorandum") [Dkt. No. 1014]; (2) the Order  
5 on Memorandum (the "Order") [Dkt No.1018]; and (3) the Amended Memorandum [Docket  
6 No. 1022], copies of which are attached hereto as Exhibits "1," "2" and "3," respectively.

7 Please take notice that Western has separately requested certification of this appeal  
8 directly to the U.S. Court of Appeals pursuant to 28 U.S.C. § 158(d)(2)(A)(i). Please further take  
9 notice that, in the event that Western's certification request is denied, Western has also filed a  
10 separate notice of election to have the appeal heard by the United States District Court for the  
11 District of Nevada pursuant to 28 U.S.C. § 158(b)(1).

12 The names of the parties and the names, addresses and telephone numbers of their  
13 respective counsel are as follows:

14 1. Appellant – Western Aircraft, Inc., and its counsel:

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27 2. Appellee - James F. Lisowski, Sr. as Chapter 7 Trustee

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1 DATED this 19<sup>th</sup> day of September, 2008.

2 GORDON & SILVER, LTD.

3  
4 By: 

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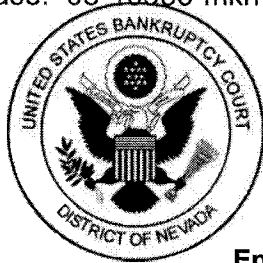
2300 "N" Street, N.W.

Washington, D.C. 20037

11 Counsel for Western Aircraft, Inc.

# **EXHIBIT “1”**

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Entered on Docket  
September 16, 2008

A handwritten signature in black ink, appearing to read "Mike K. Nakagawa".

Hon. Mike K. Nakagawa  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

In re  
SILVER STATE HELICOPTERS, LLC,  
Debtor.

Case No. BK-S-08-10936-MKN

Chapter 7

Jointly administered with

In re  
SILVER STATE SERVICES CORP.,  
Debtor.

Case No. BK-S-08-10935-MKN

Chapter 7

Date: April 23, 2008  
Time: 9:30 a.m.

**MEMORANDUM DECISION ON MOTION OF WESTERN AIRCRAFT, INC.  
FOR ORDER REQUIRING PAYMENT OF ADMINISTRATIVE EXPENSE CLAIM,  
MADE PURSUANT TO 11 U.S.C. §365(d)(3), 503(b) AND 507(a)(1), AND FOR  
ALLOWANCE OF ADMINISTRATIVE CLAIM UNDER 11 U.S.C. §503(b), AND  
TRUSTEE'S EMERGENCY MOTION TO STRIKE EXTANT DOCUMENT  
[DKT. NO. 535] ON ORDER SHORTENING TIME**

These matters were heard on April 23, 2008. The appearances of counsel were noted on the record. After presentation of oral arguments, the matters were taken under submission based on the written materials submitted by the parties and the representations of counsel at the hearing.

**BACKGROUND<sup>1</sup>**

Silver State Helicopters, LLC ("Debtor") filed a voluntary petition for Chapter 7 liquidation on February 4, 2008.<sup>2</sup> (Dkt# 1) James F. Lisowski, Sr., was appointed as the bankruptcy trustee ("Trustee") to administer the case. The petition was a "skeleton" petition inasmuch as it was accompanied only by a list of 20 largest unsecured creditors and a mailing matrix, but no schedules of assets and liabilities or a statement of financial affairs. Amended schedules of assets and liabilities were filed on February 19, 2008. (Dkt#88) An amended personal property Schedule "B" along with an amended executory contract and unexpired lease Schedule "G" was filed on March 6, 2008. (Dkt# 179)

On March 13, 2008, a Motion for Order Requiring Payment of Administrative Expense Claim Made ("Payment Motion") Pursuant to 11 U.S.C. §§ 365(d)(3), 503(b) and 507(a)(1), and For Allowance of Administrative Expense Claim Under 11 U.S.C. § 503(b) (Dkt#222) was filed by Western Aircraft, Inc. ("Western"). The Payment Motion was accompanied by a supporting legal memorandum ("Western Brief") (Dkt#223) and a Declaration of Allen Hoyt ("Hoyt Declaration") (Dkt#224). On March 14, 2008, the Trustee filed an Emergency Motion for an Order Authorizing Rejection of a Lease of Non-Residential Real Property Effective March 31, 2008 (Dkt#256). Both the latter motion ("Lease Rejection Motion") and the Payment Motion pertain to the same lease of aircraft hangar space located in Boise, Idaho ("Boise Lease").<sup>3</sup> On

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<sup>1</sup> In this Memorandum Decision, all references to "Section" shall be to the provisions of the Bankruptcy Code, 11 U.S.C. section 101, et seq., unless otherwise indicated. Likewise, all references to "Rule" shall be to the Federal Rules of Bankruptcy Procedure unless otherwise indicated.

<sup>2</sup> On the same date, a separate Chapter 7 petition was filed by a related entity, Silver State Services Corporation, denominated Case No. 08-10935. On May 22, 2008, in both cases, orders were entered (Dkt #s 251 and 633) for the two cases to be jointly administered with Silver State Helicopters to serve as the lead case.

<sup>3</sup> On the same date, the Trustee filed 31 similar motions involving other aircraft hangar spaces located in various parts of the United States.

1 March 18, 2008, an order was entered shortening time ("OST") so that the Payment Motion  
2 could be heard on April 1, 2008. (Dkt#269)

3 On March 25, 2008, a hearing on the Lease Rejection Motion was conducted. After  
4 arguments were presented, the Court granted the motion and the Boise Lease was rejected  
5 effective March 31, 2008. A written order was entered on June 2, 2008. (Dkt# 669)

6 The Payment Motion was initially heard on April 1, 2008. The Trustee had filed written  
7 opposition ("Trustee's Opposition") on March 27, 2008. (Dkt#349) In response, Western filed  
8 a Supplement to Declaration of Allen Hoyt ("Supplemental Hoyt Declaration") as well as a  
9 Declaration of Patrick J. Potter ("Potter Declaration) in support of the Payment Motion. (Dkt #s  
10 368 and 369)

11 At the April 1 hearing ("initial hearing") on the Payment Motion, the Court directed  
12 counsel for Western and the Trustee to file additional briefs on the issue of whether a landlord of  
13 nonresidential real property is entitled to a postpetition administrative claim that has priority  
14 over other administrative creditors. Western was given until April 8 to file a brief, the Trustee  
15 was given until April 18 to file his memorandum, and the hearing was continued to April 23,  
16 2008.

17 In lieu of an additional brief, Western filed a Notice of Intent ("Intent Notice") on April  
18 7, 2008 (Dkt# 428) that simply repeated its original legal position and did not address the issue  
19 framed by the Court. On April 18, 2008, the Trustee filed his brief ("Trustee's Supplemental  
20 Brief") addressing whether a landlord is afforded a "super-priority administrative claim" for the  
21 estate's obligations on an unexpired lease of nonresidential real property prior to rejection.  
22 (Dkt#520) A joinder in the Trustee's response was filed by secured creditor ORIX Finance  
23 Corporation ("ORIX"). (Dkt#522) On April 22, 2008, without leave of court, Western filed a  
24 reply ("Western Supplemental Reply") to the briefs submitted by the Trustee and ORIX. (Dkt#  
25 535). With respect to the unauthorized reply filed by Western, the Trustee filed an Emergency  
26 Motion to Strike Extant Document [Dkt. No. 535] on Order Shortening Time ("Motion to  
27  
28

1 Strike"). (Dkt# 537)

2 A hearing was conducted on April 23, 2008. After oral arguments were presented, the  
3 matter was taken under submission.

4 **APPLICABLE LEGAL STANDARDS**

5 The treatment of executory contracts and unexpired leases is governed by Section 365.  
6 Subject to bankruptcy court approval, a trustee or a debtor-in-possession may assume or reject an  
7 executory contract or unexpired lease of the debtor. See 11 U.S.C. § 365(a).<sup>4</sup> Section 365 treats  
8 leases of nonresidential real property leases differently than leases of residential real property.  
9 In a Chapter 7 proceeding, an unexpired lease of residential real property is deemed rejected 60  
10 days after the case is commenced, unless it is assumed by the bankruptcy trustee or additional  
11 time is ordered by the bankruptcy court. See 11 U.S.C. § 365(d)(1). In bankruptcy  
12 reorganization proceedings, an unexpired lease of residential real property may be assumed or  
13 rejected any time before confirmation of the reorganization or debt adjustment plan, unless a  
14 specific time is ordered by the bankruptcy court. See 11 U.S.C. § 365(d)(2).

15 With respect to an unexpired lease of nonresidential real property, Section 365 directs  
16 that the debtor-in-possession "shall timely perform all of the obligations of the debtor" after the  
17 case is filed "until such lease is assumed or rejected." See 11 U.S.C. § 365(d)(3)(Emphasis  
18 added.). For cause shown, however, the bankruptcy court "may extend...the time for  
19 performance of any such obligation that arises within 60 days after the [petition] date..., but the  
20 time for performance shall not be extended beyond such 60 day period." Id. (Emphasis added.)  
21 The debtor has the burden of demonstrating cause for an extension of the performance obligation  
22 under Section 365(d)(3). See, e.g., In re Pac-West Telecomm, Inc., 377 B.R. 119, 126  
23 (Bkrcty.D.Del. 2007)(denying request for extension where debtors merely alleged that they were  
24 too busy during first 60 days of bankruptcy case).

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25  
26 <sup>4</sup> While Section 365 refers to the rights and obligations of a bankruptcy trustee, a  
27 Chapter 11 debtor-in-possession has the same rights and obligations, with exceptions not  
28 applicable to this case, under Section 1107(a).

1 If an unexpired lease of nonresidential real property is not assumed by the debtor-in-  
2 possession within 120 days after commencement of the bankruptcy case, the lease is deemed  
3 rejected and the subject property must be surrendered. See 11 U.S.C. § 365(d)(4).<sup>5</sup> Within the  
4 120-day period, a 90-day extension of the period may be obtained from the court on cause  
5 shown. See 11 U.S.C. § 365(d)(4)(B)(i). Subsequent extensions may be granted only with the  
6 consent of the lessor. See 11 U.S.C. § 365(d)(4)(B)(ii).

### 7 DISCUSSION

8 The Court first addresses the threshold question of whether the Western Supplemental  
9 Brief should be stricken. Then the Court will address whether immediate payment of  
10 postpetition rent is required under the circumstances presented.

#### 11 I. TRUSTEE'S MOTION TO STRIKE.

12 At the initial hearing on April 1, counsel for Western requested an opportunity to  
13 brief the issue of whether nonresidential real property landlords effectively or legally have  
14 priority status for unpaid postpetition rent ahead of other administrative claimants. The briefing  
15 schedule agreed by the parties was specific: Western's brief was due on April 8, 2008, and the  
16 Trustee's memorandum was due on April 18, 2008. The April 23, 2008 continued hearing date  
17 also was agreed. Instead of providing the additional authorities requested by the Court, however,  
18 Western simply filed its "Notice of Intent" stating that it "does not believe that additional  
19 briefing of the issue is warranted given the unambiguous text of Section 365(d)(3); though  
20 Western has no objection to the trustee briefing the issue if he wishes." See Intent Notice at  
21 2:23-25.

22 In compliance with the agreed schedule, the Trustee filed his brief by the April 18  
23 deadline. Four days later, which was the day before the continued hearing, Western filed its  
24 Supplemental Reply without leave of court. Not unexpectedly, the Trustee filed his Motion to

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25  
26 <sup>5</sup> The unexpired leases of nonresidential real property must be assumed or rejected by the  
27 earlier of 120 days after the petition date or the date a bankruptcy plan is confirmed. See 11  
28 U.S.C. § 365(d)(4)(A)(i and ii).

1 Strike the late-filed brief, but seeks no other sanction.

2 At the hearing, Western's counsel argued that unauthorized reply brief should not be  
3 stricken because there was no order prohibiting Western from filing the brief. Counsel argued  
4 that under "usual motion practice", the moving party is allowed to file the final brief.<sup>6</sup> It  
5 appears, however, that counsel was unaware or had simply forgotten that the hearing on the  
6 Payment Motion was scheduled pursuant to the OST specifically requested by Western's  
7 attorneys. The OST prepared by Western's counsel specifically provided that any replies in  
8 support of the Payment Motion must be filed no later than noon on March 31, 2008. In reply to  
9 the Trustee's Opposition, Western filed the Supplemental Hoyt Declaration as well as the Potter  
10 Declaration.

11 At the initial hearing, additional briefing was permitted by the Court because Western's  
12 counsel requested it. A specific and limited schedule for submission of the parties' briefs was  
13 agreed. Western submitted its Intent Notice prior to the deadline. Having requested opportunity  
14 to brief the issue, Western specifically eschewed additional briefing. Only after the Trustee  
15 timely filed his additional brief did Western file its Supplemental Reply that contains more pages  
16 than the Trustee's memorandum and also seeks additional relief.

17 Against this backdrop, Western's position is indefensible. If the Supplemental Reply had  
18 been merely late, its filing might be characterized as neglect. In view of the Intent Notice filed  
19 by Western as well as the bizarre justification offered at the hearing, however, submission of the  
20 Supplemental Reply was, at best, a transparent attempt to "sandbag" the Trustee. The  
21 Supplemental Reply was not authorized and will be stricken.<sup>7</sup>

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22  
23 <sup>6</sup> Counsel professed to have been "taken aback" by the Trustee's Motion to Strike and  
24 asserted that his co-counsel and his local counsel would have brought it to his attention if they  
25 thought the Supplemental Reply was not authorized. It is clear that Western already had  
26 exercised its opportunity to reply under the very OST its counsel had prepared. It is unclear why  
27 none of Western's counsel were aware of it.

28 <sup>7</sup> The Court also will not consider the joinder filed by ORIX regarding the Trustee's  
Supplemental Brief since ORIX never originally filed a response to the Payment Motion.

1           **II.     WESTERN'S PAYMENT MOTION.**

2           The Debtor's schedules did not disclose the Boise Lease until March 6, 2008 when the  
3 Debtor filed its Schedule "G". Prior to the filing of Schedule "G", however, Western allegedly  
4 contacted the Trustee on several occasions, requesting payment under the Boise Lease. See  
5 Payment Motion at 2:28 to 3:7. At the initial hearing, the Trustee's counsel disputed that  
6 communications were received from Western and indicated that the Trustee had no specific  
7 knowledge of the Boise Lease until after the Debtor filed Schedule "G". The parties do not  
8 dispute, however, that Western was not paid postpetition rent for the partial month of February<sup>8</sup>  
9 nor the entire month of March. In addition to the foregoing rent, Western asserts that the estate  
10 would be obligated to pay postpetition legal fees incurred pursuant to Section 29 of the Boise  
11 Lease. See Western Brief at 9:12-14.<sup>9</sup>

12           As previously noted, Section 365(d)(2) applies only in proceedings other than a Chapter  
13 7 liquidation and includes no provision to reduce the amount of time for a trustee to make a  
14 determination to assume or reject an unexpired lease of nonresidential real property.

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15  
16           <sup>8</sup> A partial month of rent under a lease is commonly referred to as a "stub month" with  
17 the amount determined by deriving the percentage of the full month after the bankruptcy petition  
18 is filed, multiplied by the monthly rent. Apparently, a majority of courts include the stub month  
19 in the bankruptcy estate's rent obligation under Section 365(d)(3). See In re Picturesque, LLC,  
20 2006 WL 3820891 (Bkrtcy.D.Ariz. December 22, 2006)(Hollowell, J.). Although the Payment  
21 Motion does not specify the amount of rent being sought by Western, Exhibit "1" to the  
22 Supplemental Hoyt Declaration indicates that Western is seeking stub rent for the period  
23 February 6 through February 29, 2008 in the amount of \$3,806.90 and full rent for the period  
24 March 1 through March 31, 2008, in the amount of \$4,600. The total amount for the period  
25 February 6, 2008 through March 31, 2008, is \$8,406.90. Although Exhibit "1" for some reason  
26 calculated the stub rent from February 6, 2008 rather than the February 4, 2008 petition date, the  
27 Trustee has not disputed Western's inclusion of the stub rent in its administrative claim. Exhibit  
28 "1" does not include a request for a late fee.

<sup>9</sup> At the initial hearing, the Trustee disputed the reasonableness of the fees that Western  
was seeking under Section 29 of the Boise Lease, taking particularly exception to the hourly rate  
apparently being charged. Because any dispute over the reasonableness of the hourly rate might  
require an evidentiary hearing, the Court deferred any ruling on the attorney's fees being claimed  
by Western under the Boise Lease.

1 Presumably, Western did not seek to compel the Trustee to assume or reject the Boise Lease  
2 under Section 365(d)(2) because the provision simply does not apply.

3 In contrast, Section 365(d)(3) applies in Chapter 7 liquidation proceedings as well under  
4 the reorganization chapters of the Bankruptcy Code and requires immediate performance of the  
5 rent obligations for such leases after the bankruptcy case is commenced. Section 365(d)(3)  
6 clearly affords more protective treatment to nonresidential lessors whose premises may be  
7 involved in prolonged efforts to reorganize. Upon a showing of cause, a bankruptcy trustee or a  
8 debtor-in-possession may be granted temporary relief from such lease performance but Section  
9 365(d)(3) specifically provides that "...the time for performance shall not be extended beyond  
10 such 60-day period."<sup>10</sup> Thus, even if cause is shown, the obligations that arise under a  
11 nonresidential real property lease within the initial 60-day period cannot be postponed to a time  
12 after the 60-day period has elapsed.

13 The Trustee, however, did not request an extension to time to meet the estate's obligation  
14 under Section 365(d)(3) to pay postpetition rent. Rather, the Trustee filed a motion to reject the  
15 Boise Lease shortly after the Debtor confirmed the existence of the lease by filing its Schedule  
16 "G". As a result of the Trustee's motion, the Boise Lease was rejected as of March 31, 2008.

17 While neither party disputes that the Trustee's rejection of the Boise Lease limits the  
18 Trustee's exposure under the lease, rejection does not address the obligation under Section  
19 365(d)(3). Rather, the Trustee argues that he should not be required to immediately pay the rent  
20 otherwise demanded by Section 365(d)(3) because there are no funds presently on hand to pay  
21 the claimed rent. See Trustee's Opposition at 3:15-18. At the initial hearing, counsel for the  
22 Trustee indicated that there was no objection as to allowance of an administrative claim for the  
23

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24  
25 <sup>10</sup> Under Section 365(d)(3), the maximum extension permitted in the instant case would  
26 have been to April 4, 2008, i.e., the 60<sup>th</sup> day after the filing of the Debtor's bankruptcy petition.  
27 By that date, the Trustee would have been obligated under the Boise Lease to have made the  
February and March rental payments. But for the rejection effective March 31, 2008, the Trustee  
arguably would have been obligated to pay the rent due on April 1.

1 amount of rent due under the Boise Lease, but merely as to the timing of the payment. While not  
2 disputing the Trustee's asserted lack of immediately available funds, Western still argues that  
3 Section 365(d)(3) demands immediate payment. Western now specifically rejects any assertion  
4 that its claim has priority over any other administrative claim. See Intent Notice at 2:2:9-12 and  
5 2:22-23.<sup>11</sup>

6 In support of its position that it is entitled to immediate payment notwithstanding the lack  
7 of available funds, Western relies on the circuit court decisions in Towers v. Chickering &  
8 Gregory (In re Pacific-Atlantic Trading Co.), 27 F.3d 401 (9<sup>th</sup> Cir. 1994), Koenig Sporting  
9 Goods Inc. v. Morse Road Co. (In re Koenig Sporting Goods, Inc.), 203 F.3d 986 (6<sup>th</sup> Cir. 2000),  
10 and CIT Communications Finance Corp. v. Midway Airlines Corp. (In re Midway Airlines  
11 Corporation), 406 F.3d 229 (4<sup>th</sup> Cir. 2005). See Western Brief at 3:4 to 7:19. None of these  
12 decisions, however, is dispositive.

13 In Pacific-Atlantic Trading, the Chapter 7 trustee did not formally reject an unexpired  
14 lease of a substantial amount of commercial office space. The lease was deemed rejected 60  
15 days after entry of an order for relief pursuant to then-Section 365(d)(4).<sup>12</sup> Prior to the end of the  
16

17 <sup>11</sup> At the initial hearing, Western's counsel argued that the rent due under Section  
18 365(d)(3) should be treated as a payment in the ordinary course of business that would not be  
19 subject to disgorgement. Counsel suggested that since it is not unusual for postpetition creditors  
20 to be paid in the ordinary course of business without being subject to disgorgement, Western's  
21 position is not inconsistent with any established priority scheme. However, because the practical  
22 effect of such a payment would still confer a "super-priority" to Western in the event the estate is  
23 insolvent, see, e.g., In re Leisure Time Sports, Inc., 189 B.R. 511 (Bkrcty.S.D.Cal.1995)(court  
24 enforced stipulation that pre-rejection lease payments would not be subject to disgorgement), the  
25 Court invited additional briefing in lieu of counsel orally providing various case citations. That  
26 discussion led to the schedule for submission of additional briefs by Western and the Trustee.

27 <sup>12</sup> At the time Pacific-Atlantic Trading was decided, Section 365(d)(4) provided in  
28 pertinent part that "...if the trustee does not assume or reject the unexpired lease of nonresidential  
real property under which the debtor is the lessee within 60 days after the date of the order for  
relief, or within such additional time as the court, for cause, within such 60-day period, fixes,  
then such lease is deemed rejected, and the trustee shall immediately surrender such  
nonresidential real property to the lessor." Section 365(d)(4) now provides in pertinent part that  
"...an unexpired lease of nonresidential real property under which the debtor is the lessee shall be

1 60-day period, all estate property was removed from the premises. The landlord subsequently  
2 asserted an administrative expense claim for the full amount of the rent owed under the lease for  
3 the entire 60-day period even though the estate did not use the space for the entire period. The  
4 trustee asserted that the landlord was entitled an administrative claim only for the actual value of  
5 the space that was used prior to rejection, not the full amount due under the lease. Based on  
6 Section 365(d)(3), however, the Ninth Circuit panel rejected the trustee's position and held that  
7 the landlord was entitled to an administrative claim for the full amount of the rent due under the  
8 lease for the 60-day period. The circuit panel also specifically reserved any decision on whether  
9 a landlord's claim to administrative rent under Section 365(d)(3) is entitled to "super-priority  
10 status" over other administrative claims. 27 F.3d at 405. No argument was made by the Chapter  
11 7 trustee that he did not have the funds available to pay the rent during the 60-day period.

12 In Koenig Sporting Goods, a Chapter 11 debtor-in-possession made an argument similar  
13 to that of the Chapter 7 trustee in Pacific-Atlantic Trading, i.e., that the commercial landlord was  
14 only entitled to partial rent for the portion of the month that the premises were occupied by the  
15 estate. Based on Section 365(d)(3), however, the Sixth Circuit panel rejected the Chapter 11  
16 debtor-in-possession's position and required payment of rent for the entire month. 203 F.3d at  
17 990. No argument was made that the debtor did not have the funds available to pay the full  
18 amount of the rent, nor did the landlord seek any other sanction or remedy for the debtor's  
19 failure to do so.

20 In Midway Airlines, a Chapter 11 debtor-in-possession did not make postpetition  
21 payments for telephone equipment that was subject to an unexpired lease. The lease was not  
22 rejected until more than 15 months after the case was commenced. In a Chapter 11 proceeding,  
23 Section 365(d)(1) requires that timely payments on unexpired leases of personal property must  
24 start on the 61<sup>st</sup> day after the case is filed until the lease is rejected. Based on Section

25 \_\_\_\_\_  
26 deemed rejected...if the trustee does not assume or reject the lease by the earlier of (i) the date  
27 that is 120 days after the date of the order for relief, or (ii) the date of the entry of an order  
confirming a plan."

1 365(d)(10), the equipment lessor sought allowance of an administrative claim for the full amount  
2 owing under the lease beginning on the 61<sup>st</sup> day after commencement of the case through the  
3 date of rejection, i.e., the full amount of monthly rent for 13 months. The Fourth Circuit panel  
4 allowed an administrative claim for the full amount due under the lease, including any interest,  
5 taxes, late fees and attorney's fees. It specifically rejected, however, the equipment lessor's  
6 assertion that its claim under Section 365(d)(10) had priority over other allowed administrative  
7 claims. Moreover, it further rejected the lessor's argument that it was entitled to immediate  
8 payment regardless of the administrative solvency of the bankruptcy estate. 406 F.3d at 241-  
9 242.

10 In support of his position, the Trustee relies on a variety of cases for the proposition that  
11 Section 365(d)(3) does not create a priority for commercial landlords superior to other  
12 administrative claimants. See Trustee's Supplemental Brief at 3:6 to 4:9. The Trustee argues  
13 that Section 365(d)(3) does not require immediate payment of rent under a commercial lease  
14 where the estate is administratively insolvent. Id. at 4:10 to 5:5, citing In re United West, Inc.,  
15 87 B.R. 138 (Bkrtcy.D.Nev. 1988).

16 In United West, a Chapter 11 debtor leased commercial real property on a month-to-  
17 month basis. The debtor-in-possession did not assume the lease within 60 days after  
18 commencing the case and the lease was deemed rejected pursuant to then-Section 365(d)(4).  
19 The bankruptcy court noted that Section 365(d)(3) does not set forth any remedy for  
20 nonpayment. 87 B.R. at 140, citing In re Southwest Aircraft Services, Inc., 831 F.2d 848, 853  
21 (9<sup>th</sup> Cir. 1987), cert. denied, 487 U.S. 1206 (1988). The court rejected the landlord's demand  
22 under Section 365(d)(3) for immediate payment of the rent that had accrued postpetition.  
23 Instead, the court concluded that "the timing of the payment of this administrative claim [under  
24 Section 365(d)(3)], like all other administrative claims, is within the discretion of the bankruptcy  
25 court. In exercising its discretion, the court must consider, inter alia, the status of the case, the  
26 ability of the debtor to pay for all administrative expenses, and the efficacy of the remedy of  
27 immediate payment subject to surcharge." 87 B.R. at 141. The United Western court's rationale  
28

1 is consistent with this circuit's decisions in Southwest Aircraft and Pacific-Atlantic Trading.

2 In Southwest Aircraft, the bankruptcy appellate panel held that after expiration of the 60-  
3 day period to assume or reject a commercial lease under then-Section 365(d)(4), the bankruptcy  
4 court no longer had authority to extend the period. The Ninth Circuit reversed, however,  
5 concluding that the bankruptcy court could grant an extension of the 60-day deadline as long as  
6 the Chapter 11 debtor-in-possession's motion to extend was filed before expiration of the  
7 deadline. Additionally, since Section 365(d)(3) does not state the consequence of its violation,  
8 the circuit panel held that the debtor-in-possession's failure to meet the timely payment  
9 requirement under Section 365(d)(3) did not require the bankruptcy court to deem the  
10 commercial lease to be rejected. Instead, the circuit panel observed:

11 "We believe that Congress intended the bankruptcy courts to have  
12 the discretion to consider all of the particular facts and  
13 circumstances involved in each bankruptcy case and to decide  
14 whether the consequence of a violation of subsection (d)(3) should  
15 be the forfeiture of the unassumed lease, some other penalty, or no  
16 penalty at all."

831 F.2d at 854. (Emphasis added.)

15 After Southwest Aircraft, the Ninth Circuit reiterated in Pacific-Atlantic Trading that  
16 Section 365(d)(3) does not state the consequences for a violation of its terms, 27 F.3d at 405, but  
17 concluded that a lessor must be paid the full amount of the rent that became due during the 60-  
18 day period. Consistent with Southwest Aircraft, the panel in Pacific-Atlantic Trading did not  
19 require that any penalty at all be imposed for the Chapter 7 trustee's failure to comply with  
20 Section 365(d)(3).<sup>13</sup>

22 \_\_\_\_\_  
23 <sup>13</sup> In In re Telesphere Communications, Inc., 148 B.R. 525 (Bkrtcy.N.D.Ill. 1992)  
24 (Wedoff, J.), the bankruptcy court also noted that Section 365(d)(3) contains no specific remedy,  
25 but relied on its general equitable powers under Section 105(a) to order the Chapter 11 debtor-in-  
26 possession to immediately pay the unpaid portion of rent. However, Judge Wedoff further  
27 indicated that "Should the debtor in possession lack funds sufficient to comply with this order,  
28 the court will consider a request that enforcement be stayed." 148 B.R. at 531-532. Thus, the  
court fashioned a remedy consistent with both the language of Section 365(d)(3) and the policy  
of ratable distribution within creditor classes.

1 In the present case, the parties do not dispute that the Trustee does not have the funds  
2 available to satisfy every potential administrative rent claim in the case. This is not surprising  
3 since the Trustee filed 31 similar motions to reject nonresidential leases in addition to the Boise  
4 Lease. The Trustee's concern may be heightened inasmuch as Western may be entitled to late  
5 fees in the form of interest on any past due rent under Section 44 of the Boise Lease, see  
6 Cukierman v. Uecker (In re Cukierman), 265 F.3d 846, 852-53 (9<sup>th</sup> Cir. 2001), plus possible  
7 attorney's fees under Section 29 of the Boise Lease. Id. at 852. Given the status of the case and  
8 the undisputed lack of available funds, see United West, supra, the Court will not penalize the  
9 Trustee for delaying payment of Western's rent claim under Section 365(d)(3) until the  
10 administrative solvency of the bankruptcy estate can be determined. Because the Boise Lease  
11 already has been rejected and Western's administrative rent claim may be accruing significant  
12 interest, a de facto remedy for the Trustee's noncompliance with Section 365(d)(3) is present.  
13 Nothing further is required at this stage.

#### 14 CONCLUSION

15 For the reasons set forth herein, the Trustee's Motion to Strike will be granted and  
16 Western's Payment Motion will be denied to the extent it requests immediate payment of the  
17 postpetition rent under the Boise Lease. The Payment Motion will be granted to the extent it  
18 seeks allowance of the requested postpetition rent. Late fees in the form of interest as well as  
19 attorney's fees pursuant to Sections 44 and 29 of the Boise Lease will not be allowed at this  
20 time. A separate order has been entered concurrently herewith.

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Case: 08-10936-mkn Doc #: 1014 Filed: 09/16/2008 Page: 14 of 14

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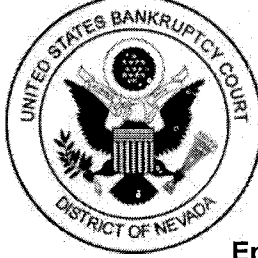
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## **EXHIBIT “2”**

Case: 08-10936-mkn Doc #: 1018 Filed: 09/16/2008 Page: 1 of 4



Entered on Docket  
September 16, 2008

A handwritten signature in dark ink, appearing to read "Mike K. Nakagawa".

Hon. Mike K. Nakagawa  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re  
SILVER STATE HELICOPTERS, LLC,  
Debtor.

Case No. BK-S-08-10936-MKN

Chapter 7

Jointly administered with

In re  
SILVER STATE SERVICES CORP.,  
Debtor.

Case No. BK-S-08-10935-MKN

Chapter 7

Date: April 23, 2008  
Time: 9:30 a.m.

**ORDER ON MEMORANDUM DECISION ON MOTION OF  
WESTERN AIRCRAFT, INC. FOR ORDER REQUIRING PAYMENT OF  
ADMINISTRATIVE EXPENSE CLAIM, MADE PURSUANT TO 11 U.S.C. §365(d)(3),  
503(b) AND 507(a)(1), AND FOR ALLOWANCE OF ADMINISTRATIVE CLAIM  
UNDER 11 U.S.C. §503(b), AND TRUSTEE'S EMERGENCY MOTION TO STRIKE  
EXTANT DOCUMENT [DKT. NO. 535] ON ORDER SHORTENING TIME**

The Court having entered its Memorandum Decision on Motion of Western Aircraft, Inc.  
for Order Requiring Payment of Administrative Expense Claim, Made Pursuant to 11 U.S.C.  
§365(d)(3), 503(b) and 507(a)(1), and for Allowance of Administrative Claim Under 11 U.S.C.  
§503(b), and Trustee's Emergency Motion to Strike Extant Document [Dkt. No. 535] on Order

Shortening Time, concurrently herewith,

**IT IS HEREBY ORDERED** that the Trustee's Emergency Motion to Strike Extant Document [Dkt. No. 535] on Order Shortening Time be, and the same hereby is, **GRANTED**.

**IT IS FURTHER ORDERED** that the Motion of Western Aircraft, Inc. for Order Requiring Payment of Administrative Expense Claim, Made Pursuant to 11 U.S.C. §365(d)(3), 503(b) and 507(a)(1), and for Allowance of Administrative Claim Under 11 U.S.C. §503(b) be, and the same hereby is, **DENIED** insofar as it seeks immediate payment of the postpetition rent allowed under 11 U.S.C. section 365(d)(3).

**IT IS FURTHER ORDERED** that Motion of Western Aircraft, Inc. for Order Requiring Payment of Administrative Expense Claim, Made Pursuant to 11 U.S.C. §365(d)(3), 503(b) and 507(a)(1), and for Allowance of Administrative Claim Under 11 U.S.C. §503(b) is **GRANTED** insofar as it seeks allowance of an administrative expense claim for rent during the period February 6, 2008 through March 31, 2008, in the total amount of \$8,406.90.

**IT IS FURTHER ORDERED** that the Motion of Western Aircraft, Inc. for Order Requiring Payment of Administrative Expense Claim, Made Pursuant to 11 U.S.C. §365(d)(3), 503(b) and 507(a)(1), and for Allowance of Administrative Claim Under 11 U.S.C. §503(b) is **DENIED WITHOUT PREJUDICE** insofar as it seeks allowance of attorney's fees and costs pursuant to Section 29 or late fees pursuant to Section 44 of the subject lease.

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Case: 08-10936-mkn Doc #: 1018 Filed: 09/16/2008 Page: 4 of 4

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5 ###

# **EXHIBIT “3”**

Case: 08-10936-mkn Doc #: 1022 Filed: 09/17/2008 Page: 1 of 15



Entered on Docket  
September 17, 2008

A handwritten signature in black ink, appearing to read "Mike K. Nakagawa".

Hon. Mike K. Nakagawa  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

In re  
SILVER STATE HELICOPTERS, LLC,  
Debtor.

Case No. BK-S-08-10936-MKN

Chapter 7

Jointly administered with

In re  
SILVER STATE SERVICES CORP.,  
Debtor.

Case No. BK-S-08-10935-MKN

Chapter 7

Date: April 23, 2008  
Time: 9:30 a.m.

**(AMENDED) MEMORANDUM DECISION ON MOTION OF  
WESTERN AIRCRAFT, INC. FOR ORDER REQUIRING PAYMENT OF  
ADMINISTRATIVE EXPENSE CLAIM, MADE PURSUANT TO 11 U.S.C. §365(d)(3),  
503(b) AND 507(a)(1), AND FOR ALLOWANCE OF ADMINISTRATIVE CLAIM  
UNDER 11 U.S.C. §503(b), AND TRUSTEE'S EMERGENCY MOTION TO STRIKE  
EXTANT DOCUMENT [DKT. NO. 535] ON ORDER SHORTENING TIME**

These matters were heard on April 23, 2008. The appearances of counsel were noted on the record. After presentation of oral arguments, the matters were taken under submission based on the written materials submitted by the parties and the representations of counsel at the hearing.

**BACKGROUND<sup>1</sup>**

Silver State Helicopters, LLC ("Debtor") filed a voluntary petition for Chapter 7 liquidation on February 4, 2008.<sup>2</sup> (Dkt# 1) James F. Lisowski, Sr., was appointed as the bankruptcy trustee ("Trustee") to administer the case. The petition was a "skeleton" petition inasmuch as it was accompanied only by a list of 20 largest unsecured creditors and a mailing matrix, but no schedules of assets and liabilities or a statement of financial affairs. Amended schedules of assets and liabilities were filed on February 19, 2008. (Dkt#88) An amended personal property Schedule "B" along with an amended executory contract and unexpired lease Schedule "G" was filed on March 6, 2008. (Dkt# 179)

On March 13, 2008, a Motion for Order Requiring Payment of Administrative Expense Claim Made ("Payment Motion") Pursuant to 11 U.S.C. §§ 365(d)(3), 503(b) and 507(a)(1), and For Allowance of Administrative Expense Claim Under 11 U.S.C. § 503(b) (Dkt#222) was filed by Western Aircraft, Inc. ("Western"). The Payment Motion was accompanied by a supporting legal memorandum ("Western Brief") (Dkt#223) and a Declaration of Allen Hoyt ("Hoyt Declaration") (Dkt#224). On March 14, 2008, the Trustee filed an Emergency Motion for an Order Authorizing Rejection of a Lease of Non-Residential Real Property Effective March 31, 2008 (Dkt#256). Both the latter motion ("Lease Rejection Motion") and the Payment Motion pertain to the same lease of aircraft hangar space located in Boise, Idaho ("Boise Lease").<sup>3</sup> On

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<sup>1</sup> In this Memorandum Decision, all references to "Section" shall be to the provisions of the Bankruptcy Code, 11 U.S.C. section 101, et seq., unless otherwise indicated. Likewise, all references to "Rule" shall be to the Federal Rules of Bankruptcy Procedure unless otherwise indicated.

<sup>2</sup> On the same date, a separate Chapter 7 petition was filed by a related entity, Silver State Services Corporation, denominated Case No. 08-10935. On May 22, 2008, in both cases, orders were entered (Dkt #s 251 and 633) for the two cases to be jointly administered with Silver State Helicopters to serve as the lead case.

<sup>3</sup> On the same date, the Trustee filed 31 similar motions involving other aircraft hangar spaces located in various parts of the United States.

1 March 18, 2008, an order was entered shortening time ("OST") so that the Payment Motion  
2 could be heard on April 1, 2008. (Dkt#269)

3 On March 25, 2008, a hearing on the Lease Rejection Motion was conducted. After  
4 arguments were presented, the Court granted the motion and the Boise Lease was rejected  
5 effective March 31, 2008. A written order was entered on June 2, 2008. (Dkt# 669)

6 The Payment Motion was initially heard on April 1, 2008. The Trustee had filed written  
7 opposition ("Trustee's Opposition") on March 27, 2008. (Dkt#349) In response, Western filed  
8 a Supplement to Declaration of Allen Hoyt ("Supplemental Hoyt Declaration") as well as a  
9 Declaration of Patrick J. Potter ("Potter Declaration") in support of the Payment Motion. (Dkt #s  
10 368 and 369)

11 At the April 1 hearing ("initial hearing") on the Payment Motion, the Court directed  
12 counsel for Western and the Trustee to file additional briefs on the issue of whether a landlord of  
13 nonresidential real property is entitled to a postpetition administrative claim that has priority  
14 over other administrative creditors. Western was given until April 8 to file a brief, the Trustee  
15 was given until April 18 to file his memorandum, and the hearing was continued to April 23,  
16 2008.

17 In lieu of an additional brief, Western filed a Notice of Intent ("Intent Notice") on April  
18 7, 2008 (Dkt# 428) that simply repeated its original legal position and did not address the issue  
19 framed by the Court. On April 18, 2008, the Trustee filed his brief ("Trustee's Supplemental  
20 Brief") addressing whether a landlord is afforded a "super-priority administrative claim" for the  
21 estate's obligations on an unexpired lease of nonresidential real property prior to rejection.  
22 (Dkt#520) A joinder in the Trustee's response was filed by secured creditor ORIX Finance  
23 Corporation ("ORIX"). (Dkt#522) On April 22, 2008, without leave of court, Western filed a  
24 reply ("Western Supplemental Reply") to the briefs submitted by the Trustee and ORIX. (Dkt#  
25 535). With respect to the unauthorized reply filed by Western, the Trustee filed an Emergency  
26 Motion to Strike Extant Document [Dkt. No. 535] on Order Shortening Time ("Motion to  
27  
28

1 Strike"). (Dkt# 537)

2 A hearing was conducted on April 23, 2008. After oral arguments were presented, the  
3 matter was taken under submission.

4 **APPLICABLE LEGAL STANDARDS**

5 The treatment of executory contracts and unexpired leases is governed by Section 365.  
6 Subject to bankruptcy court approval, a trustee or a debtor-in-possession may assume or reject an  
7 executory contract or unexpired lease of the debtor. See 11 U.S.C. § 365(a).<sup>4</sup> Section 365 treats  
8 leases of nonresidential real property leases differently than leases of residential real property.  
9 In a Chapter 7 proceeding, an unexpired lease of residential real property is deemed rejected 60  
10 days after the case is commenced, unless it is assumed by the bankruptcy trustee or additional  
11 time is ordered by the bankruptcy court. See 11 U.S.C. § 365(d)(1). In bankruptcy  
12 reorganization proceedings, an unexpired lease of residential real property may be assumed or  
13 rejected any time before confirmation of the reorganization or debt adjustment plan, unless a  
14 specific time is ordered by the bankruptcy court. See 11 U.S.C. § 365(d)(2).

15 With respect to an unexpired lease of nonresidential real property, Section 365 directs  
16 that the debtor-in-possession "shall timely perform all of the obligations of the debtor" after the  
17 case is filed "until such lease is assumed or rejected." See 11 U.S.C. § 365(d)(3)(Emphasis  
18 added.). For cause shown, however, the bankruptcy court "may extend...the time for  
19 performance of any such obligation that arises within 60 days after the [petition] date..., but the  
20 time for performance shall not be extended beyond such 60 day period." Id. (Emphasis added.)  
21 The debtor has the burden of demonstrating cause for an extension of the performance obligation  
22 under Section 365(d)(3). See, e.g., In re Pac-West Telecomm, Inc., 377 B.R. 119, 126  
23 (Bkrcty.D.Del. 2007)(denying request for extension where debtors merely alleged that they were  
24 too busy during first 60 days of bankruptcy case).

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25  
26 <sup>4</sup> While Section 365 refers to the rights and obligations of a bankruptcy trustee, a  
27 Chapter 11 debtor-in-possession has the same rights and obligations, with exceptions not  
28 applicable to this case, under Section 1107(a).

1 If an unexpired lease of nonresidential real property is not assumed by the debtor-in-  
2 possession within 120 days after commencement of the bankruptcy case, the lease is deemed  
3 rejected and the subject property must be surrendered. See 11 U.S.C. § 365(d)(4).<sup>5</sup> Within the  
4 120-day period, a 90-day extension of the period may be obtained from the court on cause  
5 shown. See 11 U.S.C. § 365(d)(4)(B)(i). Subsequent extensions may be granted only with the  
6 consent of the lessor. See 11 U.S.C. § 365(d)(4)(B)(ii).

### 7 DISCUSSION

8 The Court first addresses the threshold question of whether the Western Supplemental  
9 Brief should be stricken. Then the Court will address whether immediate payment of  
10 postpetition rent is required under the circumstances presented.

#### 11 I. TRUSTEE'S MOTION TO STRIKE.

12 At the initial hearing on April 1, counsel for Western requested an opportunity to  
13 brief the issue of whether nonresidential real property landlords effectively or legally have  
14 priority status for unpaid postpetition rent ahead of other administrative claimants. The briefing  
15 schedule agreed by the parties was specific: Western's brief was due on April 8, 2008, and the  
16 Trustee's memorandum was due on April 18, 2008. The April 23, 2008 continued hearing date  
17 also was agreed. Instead of providing the additional authorities requested by the Court, however,  
18 Western simply filed its "Notice of Intent" stating that it "does not believe that additional  
19 briefing of the issue is warranted given the unambiguous text of Section 365(d)(3); though  
20 Western has no objection to the trustee briefing the issue if he wishes." See Intent Notice at  
21 2:23-25.

22 In compliance with the agreed schedule, the Trustee filed his brief by the April 18  
23 deadline. Four days later, which was the day before the continued hearing, Western filed its  
24 Supplemental Reply without leave of court. Not unexpectedly, the Trustee filed his Motion to

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25  
26 <sup>5</sup> The unexpired leases of nonresidential real property must be assumed or rejected by the  
27 earlier of 120 days after the petition date or the date a bankruptcy plan is confirmed. See 11  
28 U.S.C. § 365(d)(4)(A)(i and ii).

1 Strike the late-filed brief, but seeks no other sanction.

2 At the hearing, Western's counsel argued that unauthorized reply brief should not be  
3 stricken because there was no order prohibiting Western from filing the brief. Counsel argued  
4 that under "usual motion practice", the moving party is allowed to file the final brief.<sup>6</sup> It  
5 appears, however, that counsel was unaware or had simply forgotten that the hearing on the  
6 Payment Motion was scheduled pursuant to the OST specifically requested by Western's  
7 attorneys. The OST prepared by Western's counsel specifically provided that any replies in  
8 support of the Payment Motion must be filed no later than noon on March 31, 2008. In reply to  
9 the Trustee's Opposition, Western filed the Supplemental Hoyt Declaration as well as the Potter  
10 Declaration.

11 At the initial hearing, additional briefing was permitted by the Court because Western's  
12 counsel requested it. A specific and limited schedule for submission of the parties' briefs was  
13 agreed. Western submitted its Intent Notice prior to the deadline. Having requested opportunity  
14 to brief the issue, Western specifically eschewed additional briefing. Only after the Trustee  
15 timely filed his additional brief did Western file its Supplemental Reply that contains more pages  
16 than the Trustee's memorandum and also seeks additional relief.

17 Against this backdrop, Western's position is indefensible. If the Supplemental Reply had  
18 been merely late, its filing might be characterized as neglect. In view of the Intent Notice filed  
19 by Western as well as the bizarre justification offered at the hearing, however, submission of the  
20 Supplemental Reply was, at best, a transparent attempt to "sandbag" the Trustee. The  
21 Supplemental Reply was not authorized and will be stricken.<sup>7</sup>

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22  
23 <sup>6</sup> Counsel professed to have been "taken aback" by the Trustee's Motion to Strike and  
24 asserted that his co-counsel and his local counsel would have brought it to his attention if they  
25 thought the Supplemental Reply was not authorized. It is clear that Western already had  
26 exercised its opportunity to reply under the very OST its counsel had prepared. It is unclear why  
27 none of Western's counsel were aware of it.

28 <sup>7</sup> The Court also will not consider the joinder filed by ORIX regarding the Trustee's  
Supplemental Brief since ORIX never originally filed a response to the Payment Motion.

1           **II.     WESTERN'S PAYMENT MOTION.**

2           The Debtor's schedules did not disclose the Boise Lease until March 6, 2008 when the  
3 Debtor filed its Schedule "G". Prior to the filing of Schedule "G", however, Western allegedly  
4 contacted the Trustee on several occasions, requesting payment under the Boise Lease. See  
5 Payment Motion at 2:28 to 3:7. At the initial hearing, the Trustee's counsel disputed that  
6 communications were received from Western and indicated that the Trustee had no specific  
7 knowledge of the Boise Lease until after the Debtor filed Schedule "G". The parties do not  
8 dispute, however, that Western was not paid postpetition rent for the partial month of February<sup>8</sup>  
9 nor the entire month of March. In addition to the foregoing rent, Western asserts that the estate  
10 would be obligated to pay postpetition legal fees incurred pursuant to Section 29 of the Boise  
11 Lease. See Western Brief at 9:12-14.<sup>9</sup>

12           As previously noted, Section 365(d)(2) applies only in proceedings other than a Chapter  
13 7 liquidation and includes no provision to reduce the amount of time for a trustee to make a  
14 determination to assume or reject an unexpired lease of nonresidential real property.

15  
16           <sup>8</sup> A partial month of rent under a lease is commonly referred to as a "stub month" with  
17 the amount determined by deriving the percentage of the full month after the bankruptcy petition  
18 is filed, multiplied by the monthly rent. Apparently, a majority of courts include the stub month  
19 in the bankruptcy estate's rent obligation under Section 365(d)(3). See In re Picturesque, LLC,  
20 2006 WL 3820891 (Bkrcty.D.Ariz. December 22, 2006)(Hollowell, J.). Although the Payment  
21 Motion does not specify the amount of rent being sought by Western, Exhibit "1" to the  
22 Supplemental Hoyt Declaration indicates that Western is seeking stub rent for the period  
23 February 6 through February 29, 2008 in the amount of \$3,806.90 and full rent for the period  
24 March 1 through March 31, 2008, in the amount of \$4,600. The total amount for the period  
25 February 6, 2008 through March 31, 2008, is \$8,406.90. Although Exhibit "1" for some reason  
26 calculated the stub rent from February 6, 2008 rather than the February 4, 2008 petition date, the  
27 Trustee has not disputed Western's inclusion of the stub rent in its administrative claim. Exhibit  
28 "1" does not include a request for a late fee.

<sup>9</sup> At the initial hearing, the Trustee disputed the reasonableness of the fees that Western  
was seeking under Section 29 of the Boise Lease, taking particularly exception to the hourly rate  
apparently being charged. Because any dispute over the reasonableness of the hourly rate might  
require an evidentiary hearing, the Court deferred any ruling on the attorney's fees being claimed  
by Western under the Boise Lease.

1 Presumably, Western did not seek to compel the Trustee to assume or reject the Boise Lease  
2 under Section 365(d)(2) because the provision simply does not apply.

3 In contrast, Section 365(d)(3) applies in Chapter 7 liquidation proceedings as well under  
4 the reorganization chapters of the Bankruptcy Code and requires immediate performance of the  
5 rent obligations for such leases after the bankruptcy case is commenced. Section 365(d)(3)  
6 clearly affords more protective treatment to nonresidential lessors whose premises may be  
7 involved in prolonged efforts to reorganize. Upon a showing of cause, a bankruptcy trustee or a  
8 debtor-in-possession may be granted temporary relief from such lease performance but Section  
9 365(d)(3) specifically provides that "...the time for performance shall not be extended beyond  
10 such 60-day period."<sup>10</sup> Thus, even if cause is shown, the obligations that arise under a  
11 nonresidential real property lease within the initial 60-day period cannot be postponed to a time  
12 after the 60-day period has elapsed.

13 The Trustee, however, did not request an extension to time to meet the estate's obligation  
14 under Section 365(d)(3) to pay postpetition rent. Rather, the Trustee filed a motion to reject the  
15 Boise Lease shortly after the Debtor confirmed the existence of the lease by filing its Schedule  
16 "G". As a result of the Trustee's motion, the Boise Lease was rejected as of March 31, 2008.

17 While neither party disputes that the Trustee's rejection of the Boise Lease limits the  
18 Trustee's exposure under the lease, rejection does not address the obligation under Section  
19 365(d)(3). Rather, the Trustee argues that he should not be required to immediately pay the rent  
20 otherwise demanded by Section 365(d)(3) because there are no funds presently on hand to pay  
21 the claimed rent. See Trustee's Opposition at 3:15-18. At the initial hearing, counsel for the  
22 Trustee indicated that there was no objection as to allowance of an administrative claim for the  
23

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24  
25 <sup>10</sup> Under Section 365(d)(3), the maximum extension permitted in the instant case would  
26 have been to April 4, 2008, i.e., the 60<sup>th</sup> day after the filing of the Debtor's bankruptcy petition.  
27 By that date, the Trustee would have been obligated under the Boise Lease to have made the  
February and March rental payments. But for the rejection effective March 31, 2008, the Trustee  
arguably would have been obligated to pay the rent due on April 1.

1 amount of rent due under the Boise Lease, but merely as to the timing of the payment. While not  
2 disputing the Trustee's asserted lack of immediately available funds, Western still argues that  
3 Section 365(d)(3) demands immediate payment. Western now specifically rejects any assertion  
4 that its claim has priority over any other administrative claim. See Intent Notice at 2:2:9-12 and  
5 2:22-23.<sup>11</sup>

6 In support of its position that it is entitled to immediate payment notwithstanding the lack  
7 of available funds, Western relies on the circuit court decisions in Towers v. Chickering &  
8 Gregory (In re Pacific-Atlantic Trading Co.), 27 F.3d 401 (9<sup>th</sup> Cir. 1994), Koenig Sporting  
9 Goods Inc. v. Morse Road Co. (In re Koenig Sporting Goods, Inc.), 203 F.3d 986 (6<sup>th</sup> Cir. 2000),  
10 and CIT Communications Finance Corp. v. Midway Airlines Corp. (In re Midway Airlines  
11 Corporation), 406 F.3d 229 (4<sup>th</sup> Cir. 2005). See Western Brief at 3:4 to 7:19. None of these  
12 decisions, however, is dispositive.

13 In Pacific-Atlantic Trading, the Chapter 7 trustee did not formally reject an unexpired  
14 lease of a substantial amount of commercial office space. The lease was deemed rejected 60  
15 days after entry of an order for relief pursuant to then-Section 365(d)(4).<sup>12</sup> Prior to the end of the  
16

17 <sup>11</sup> At the initial hearing, Western's counsel argued that the rent due under Section  
18 365(d)(3) should be treated as a payment in the ordinary course of business that would not be  
19 subject to disgorgement. Counsel suggested that since it is not unusual for postpetition creditors  
20 to be paid in the ordinary course of business without being subject to disgorgement, Western's  
21 position is not inconsistent with any established priority scheme. However, because the practical  
22 effect of such a payment would still confer a "super-priority" to Western in the event the estate is  
23 insolvent, see, e.g., In re Leisure Time Sports, Inc., 189 B.R. 511 (Bkrtcy.S.D.Cal.1995)(court  
enforced stipulation that pre-rejection lease payments would not be subject to disgorgement), the  
Court invited additional briefing in lieu of counsel orally providing various case citations. That  
discussion led to the schedule for submission of additional briefs by Western and the Trustee.

24 <sup>12</sup> At the time Pacific-Atlantic Trading was decided, Section 365(d)(4) provided in  
25 pertinent part that "...if the trustee does not assume or reject the unexpired lease of nonresidential  
26 real property under which the debtor is the lessee within 60 days after the date of the order for  
27 relief, or within such additional time as the court, for cause, within such 60-day period, fixes,  
then such lease is deemed rejected, and the trustee shall immediately surrender such  
nonresidential real property to the lessor." Section 365(d)(4) now provides in pertinent part that  
"...an unexpired lease of nonresidential real property under which the debtor is the lessee shall be

1 60-day period, all estate property was removed from the premises. The landlord subsequently  
2 asserted an administrative expense claim for the full amount of the rent owed under the lease for  
3 the entire 60-day period even though the estate did not use the space for the entire period. The  
4 trustee asserted that the landlord was entitled an administrative claim only for the actual value of  
5 the space that was used prior to rejection, not the full amount due under the lease. Based on  
6 Section 365(d)(3), however, the Ninth Circuit panel rejected the trustee's position and held that  
7 the landlord was entitled to an administrative claim for the full amount of the rent due under the  
8 lease for the 60-day period. The circuit panel also specifically reserved any decision on whether  
9 a landlord's claim to administrative rent under Section 365(d)(3) is entitled to "super-priority  
10 status" over other administrative claims. 27 F.3d at 405. No argument was made by the Chapter  
11 7 trustee that he did not have the funds available to pay the rent during the 60-day period.

12 In Koenig Sporting Goods, a Chapter 11 debtor-in-possession made an argument similar  
13 to that of the Chapter 7 trustee in Pacific-Atlantic Trading, i.e., that the commercial landlord was  
14 only entitled to partial rent for the portion of the month that the premises were occupied by the  
15 estate. Based on Section 365(d)(3), however, the Sixth Circuit panel rejected the Chapter 11  
16 debtor-in-possession's position and required payment of rent for the entire month. 203 F.3d at  
17 990. No argument was made that the debtor did not have the funds available to pay the full  
18 amount of the rent, nor did the landlord seek any other sanction or remedy for the debtor's  
19 failure to do so.

20 In Midway Airlines, a Chapter 11 debtor-in-possession did not make postpetition  
21 payments for telephone equipment that was subject to an unexpired lease. The lease was not  
22 rejected until more than 15 months after the case was commenced. In a Chapter 11 proceeding,  
23 Section 365(d)(1) requires that timely payments on unexpired leases of personal property must  
24 start on the 61<sup>st</sup> day after the case is filed until the lease is rejected. Based on Section

25 \_\_\_\_\_  
26 deemed rejected...if the trustee does not assume or reject the lease by the earlier of (i) the date  
27 that is 120 days after the date of the order for relief, or (ii) the date of the entry of an order  
confirming a plan."

1 365(d)(10), the equipment lessor sought allowance of an administrative claim for the full amount  
2 owing under the lease beginning on the 61<sup>st</sup> day after commencement of the case through the  
3 date of rejection, i.e., the full amount of monthly rent for 13 months. The Fourth Circuit panel  
4 allowed an administrative claim for the full amount due under the lease, including any interest,  
5 taxes, late fees and attorney's fees. It specifically rejected, however, the equipment lessor's  
6 assertion that its claim under Section 365(d)(10) had priority over other allowed administrative  
7 claims. Moreover, it further rejected the lessor's argument that it was entitled to immediate  
8 payment regardless of the administrative solvency of the bankruptcy estate. 406 F.3d at 241-  
9 242.

10 In support of his position, the Trustee relies on a variety of cases for the proposition that  
11 Section 365(d)(3) does not create a priority for commercial landlords superior to other  
12 administrative claimants. See Trustee's Supplemental Brief at 3:6 to 4:9. The Trustee argues  
13 that Section 365(d)(3) does not require immediate payment of rent under a commercial lease  
14 where the estate is administratively insolvent. Id. at 4:10 to 5:5, citing In re United West, Inc.,  
15 87 B.R. 138 (Bkrcty.D.Nev. 1988).

16 In United West, a Chapter 11 debtor leased commercial real property on a month-to-  
17 month basis. The debtor-in-possession did not assume the lease within 60 days after  
18 commencing the case and the lease was deemed rejected pursuant to then-Section 365(d)(4).  
19 The bankruptcy court noted that Section 365(d)(3) does not set forth any remedy for  
20 nonpayment. 87 B.R. at 140, citing In re Southwest Aircraft Services, Inc., 831 F.2d 848, 853  
21 (9<sup>th</sup> Cir. 1987), cert. denied, 487 U.S. 1206 (1988). The court rejected the landlord's demand  
22 under Section 365(d)(3) for immediate payment of the rent that had accrued postpetition.  
23 Instead, the court concluded that "the timing of the payment of this administrative claim [under  
24 Section 365(d)(3)], like all other administrative claims, is within the discretion of the bankruptcy  
25 court. In exercising its discretion, the court must consider, inter alia, the status of the case, the  
26 ability of the debtor to pay for all administrative expenses, and the efficacy of the remedy of  
27 immediate payment subject to surcharge." 87 B.R. at 141. The United Western court's rationale  
28

1 is consistent with this circuit's decisions in Southwest Aircraft and Pacific-Atlantic Trading.

2 In Southwest Aircraft, the bankruptcy appellate panel held that after expiration of the 60-  
3 day period to assume or reject a commercial lease under then-Section 365(d)(4), the bankruptcy  
4 court no longer had authority to extend the period. The Ninth Circuit reversed, however,  
5 concluding that the bankruptcy court could grant an extension of the 60-day deadline as long as  
6 the Chapter 11 debtor-in-possession's motion to extend was filed before expiration of the  
7 deadline. Additionally, since Section 365(d)(3) does not state the consequence of its violation,  
8 the circuit panel held that the debtor-in-possession's failure to meet the timely payment  
9 requirement under Section 365(d)(3) did not require the bankruptcy court to deem the  
10 commercial lease to be rejected. Instead, the circuit panel observed:

11 "We believe that Congress intended the bankruptcy courts to have  
12 the discretion to consider all of the particular facts and  
13 circumstances involved in each bankruptcy case and to decide  
14 whether the consequence of a violation of subsection (d)(3) should  
15 be the forfeiture of the unassumed lease, some other penalty, or no  
16 penalty at all."

17 831 F.2d at 854. (Emphasis added.)

18 After Southwest Aircraft, the Ninth Circuit reiterated in Pacific-Atlantic Trading that  
19 Section 365(d)(3) does not state the consequences for a violation of its terms, 27 F.3d at 405, but  
20 concluded that a lessor must be paid the full amount of the rent that became due during the 60-  
21 day period. Consistent with Southwest Aircraft, the panel in Pacific-Atlantic Trading did not  
22 require that any penalty at all be imposed for the Chapter 7 trustee's failure to comply with  
23 Section 365(d)(3).<sup>13</sup>

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24 <sup>13</sup> In In re Telesphere Communications, Inc., 148 B.R. 525 (Bkrcty.N.D.Ill. 1992)  
25 (Wedoff, J.), the bankruptcy court also noted that Section 365(d)(3) contains no specific remedy,  
26 but relied on its general equitable powers under Section 105(a) to order the Chapter 11 debtor-in-  
27 possession to immediately pay the unpaid portion of rent. However, Judge Wedoff further  
28 indicated that "Should the debtor in possession lack funds sufficient to comply with this order,  
the court will consider a request that enforcement be stayed." 148 B.R. at 531-532. Thus, the  
court fashioned a remedy consistent with both the language of Section 365(d)(3) and the policy  
of ratable distribution within creditor classes.

1 In the present case, the parties do not dispute that the Trustee does not have the funds  
2 available to satisfy every potential administrative rent claim in the case. This is not surprising  
3 since the Trustee filed 31 similar motions to reject nonresidential leases in addition to the Boise  
4 Lease. The Trustee's concern may be heightened inasmuch as Western may be entitled to late  
5 fees in the form of interest on any past due rent under Section 44 of the Boise Lease, see  
6 Cukierman v. Uecker (In re Cukierman), 265 F.3d 846, 852-53 (9<sup>th</sup> Cir. 2001), plus possible  
7 attorney's fees under Section 29 of the Boise Lease. Id. at 852. Given the status of the case and  
8 the undisputed lack of available funds, see United West, supra, the Court will not penalize the  
9 Trustee for delaying payment of Western's rent claim under Section 365(d)(3) until the  
10 administrative solvency of the bankruptcy estate can be determined. Because the Boise Lease  
11 already has been rejected and Western's administrative rent claim may be accruing significant  
12 interest, a de facto remedy for the Trustee's noncompliance with Section 365(d)(3) is present.  
13 Nothing further is required at this stage.

#### 14 CONCLUSION

15 For the reasons set forth herein, the Trustee's Motion to Strike will be granted and  
16 Western's Payment Motion will be denied to the extent it requests immediate payment of the  
17 postpetition rent under the Boise Lease. The Payment Motion will be granted to the extent it  
18 seeks allowance of the requested postpetition rent. Late fees in the form of interest as well as  
19 attorney's fees pursuant to Sections 44 and 29 of the Boise Lease will not be allowed at this  
20 time. A separate order has been entered concurrently herewith.

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